February 4, 2008

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
400 Yesler Way, Room 404
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654
Email: hearex@metrokc.gov

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E05G0246**

JON & MARJEAN KRUPP
Code Enforcement Appeal

Location: 17268 Southeast Petrovitsky Road, Renton

Appellants: Jon & MarJean Krupp
represented by **Justin Park**, Attorney at Law
Romero Park & Wiggins P.S.
155 – 108th Ave. NE, Suite 202
Bellevue, WA 98004-5901
Telephone: (425) 450-5000
Facsimile: (425) 450-0728
Telephone: (425) 226-5173

King County: Department of Development and Environmental Services (DDES)
represented by **Holly Sawin**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
Telephone: (206) 296-6772
Facsimile: (206) 296-6604

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal with revised compliance schedule
Department's Final Recommendation:	Deny appeal with revised compliance schedule
Examiner's Decision:	Sustain appeal; reverse and vacate Notice and Order

EXAMINER PROCEEDINGS:

Hearing opened:	December 19, 2007 (continued from November 13, 2007)
Hearing closed:	December 19, 2007

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On October 24, 2006, the King County Department of Development and Environmental Services (DDES) issued a Notice and Order to Appellants Jon Roger and MarJean Krupp that found a code violation on their R-4-SO-zoned property located at 17268 Southeast Petrovitsky Road in the unincorporated Renton area. The Notice and Order cited the Krupps and the property with the following violation:

   A. Clearing, grading and placement of fill within an environmentally critical area (wetland, wetland buffer, and Shoreline Environment) without the required permits and approvals.

   The specific allegation DDES makes in the subject enforcement action is, "A gravel road was created on the subject property…sometime after 2002…. A grading permit is required to address this violation."

   The found violation was required by the Notice and Order to be corrected by obtainment of a clearing/grading permit, with a complete application to be submitted for DDES review by November 23, 2006, and the application to include a wetland delineation and restoration plan.

2. The Krupps filed a timely appeal of the Notice and Order, denying the allegation of violation by clearing, grading and placement of fill, and asserting that the only activity that had been conducted on the property was yard landscape and maintenance.

3. The property was the subject of a prior County code enforcement action starting in or around 1998 regarding placement of fill in the eastern portion of the property (an area separate from the subject "road" or driveway). A gravel driveway (hereinafter referred to interchangeably as "drive," "driveway," "road," and "path," including at times with the modifiers "gravel" and "graveled") which had been improved on the site was tangentially involved in a restoration program required under the enforcement action. The restoration work was conducted under a grading permit (L00CG192) and field inspection and approval by County personnel. Included in the restoration plan approval, whether written or *ad hoc* in the field, was an allowance of fill being removed from the restoration area to be placed elsewhere onsite or offsite. One of the areas it could be placed onsite (and/or was required to be; see next Finding) was in the gravel driveway area.

4. Testimonial accounts vary as to whether the County actually required that the entire gravel driveway area be filled in with the removed fill spoils and/or reseeded to grass, and no documentary evidence is submitted to assist in resolving the discrepancy, though as will be seen its relevance to this case is minor.[1] In the final analysis, though the approved plan's

[1] The County-approved restoration work site plan depicts "grass" in one sole area of what is an area termed "gravel path" in the "before restoration" counterpart plan. The approved site plan makes no dimensional or other depiction of the areal extent of such "grass." The site plan includes a note adjacent to a cross-section of "Fill to be removed" stating, "Grass and topsoil to be spread over gravel path area to a depth of 4 inches only. All extra fill to be disposed of outside of the wetland or offsite." There is no contingency provision in the plan for the possibility of insufficient fill spoils to cover the "gravel path."

requirements are insufficiently detailed in such regard, there apparently was some at least informal expectation by County staff during the restoration project review that as part of the restoration work the graveled driveway would be completely filled and/or reseeded to become grassed over but, as can be seen from Finding 6, that did not occur.

5. The gravel driveway is claimed by County personnel to have become overgrown since the prior enforcement action, but such contention of overgrown status is disputed by Appellants and is not supported by the evidence. The preponderance of the evidence shows some minor grass encroachment growth into the gravel drive area (see Exhibit 11F), but not to any extent of obscuring or discontinuing the distinct, clearly open and usable gravel driveway. (It is also evident from the record that there occurs regularly some seasonal grass encroachment and retreat on the gravel driveway, concurrent with the ebb and flow of the rainy season-dry season cycle.)

6. The County expectation of the driveway area becoming completely filled and/or grassed-over was not realized in the field and in fact was not required to be implemented during the County's field inspection, and the restoration project came to a rather vague conclusion as to work done in the driveway area (but in any event was granted final inspection approval). The assigned County field inspector at the time testified that the driveway area was allowed to be used as a fill placement area as part of a "compromise" in the restoration plan's implementation, but "couldn't say for sure" what had actually resulted from the fill placement. The inspector could not recollect whether there had been dirt placement along the entire extent of the driveway, or whether there had been enough fill to cover the entirety of the driveway, but did testify that she "may not have required it completely." In addition, she could not recollect whether grass had successfully grown in the area of the driveway. The DDES inspector testified that the driveway "at one point may have been a road" and that it had a hard base, and that it was a "compromise to go back to a lawn" in the restoration work. However, the inspector testified that "how it ended up, [she did not] know." The inspector testified that she "assumed" compliance had been achieved, and had "no reason to believe" that it had not been achieved.

7. What is known from the County's review at the time of the restoration work is that a code enforcement Compliance Certificate was issued upon the obtainment of the clearing/grading permit for the grading work and restoration on January 8, 2001, and that the work was signed off (granted final inspection approval) in the field by the County inspector on January 22, 2002.

8. Appellant Jon Roger Krupp testified that all of the restoration work required by the County for the 1998 enforcement action had been performed, that the imported fill then at issue had been removed from the area required of such removal, and that the Appellants were given the option of placing the removed fill on the gravel area onsite, but that there was not enough to cover even half of the driveway.

9. DDES argues that the allegedly new driveway improvement "appears to be additional clearing," but no compelling evidence is offered to support such allegation. DDES contends through its comparison of year-dated aerial photographs of the property that the driveway has been improved by new clearing and the placement of new gravel since the final closure of the restoration work. From review of the aerial photographs used for DDES's site comparison, it is apparent that the gravel path was newly visible from overhead in 2005 compared with overhead visibility in 2002 (see Exhibit nos. 4a, b, d and e; also see Exhibit no. 11h submitted by the Appellants, for additional comparison). But the persuasive evidence in the record shows that such newly visible quality is not due to the absence of the clearing and gravel improvement in the prior year photograph, but instead due to the earlier obscuring of the pertinent area from overhead view by fully leafed-out summer tree canopy. That obscuring canopy was later removed (so as to be absent in the 2005 aerial photograph) by the neighboring property owner (on whose property the

trunks of such trees were located, with the canopy branches partly overhanging well onto the subject property and over much of the driveway area), revealing the driveway from its previous obscuration.

10. The circumstantial assertion of a dump truck/gravel truck having been driven onsite is not by any means persuasive that any rock and/or earth material was imported onto the site by the truck, much less that any was dumped onsite. The unrefuted sworn testimony is that the truck was driven onsite as part of the Appellant's business operations and was not used in any active hauling/dumping in relation to the gravel drive or any other improvement onsite.

11. The unrefuted testimony in the record is that no gravel was added to the path/driveway between the year 2000 and the present time.

12. In summary, the following facts are evident from the record:

A. DDES's assertion of new clearing and new road work by the placement of apparently "new" gravel onsite is erroneously based on somewhat cursory aerial photograph analysis from photographs that did not have the same basis of physical factors, (*i.e.*, the presence of tree vegetation, which varied from photo to photo) and thus could not provide an equivalent basis of comparison.

B Not only have the Appellants presented a plausible alternative explanation for the appearance of "new" clearing and gravel placement onsite, the removal of obscuring tree canopy, but that alternative explanation is one which is persuasively borne out by the evidence presented into the record, including unrefuted sworn testimony.

C. The asserted circumstantial "evidence" of material importation by a truck driven onsite is a logically and evidentially unsupportable inference (from its stipulated mere presence), while the unrefuted testimony is that the truck was not involved in placement of gravel or any other material in the subject driveway area.

D. The preponderance of the evidence in the record does not support the County's assertion of new clearing and gravel placement. The evidence in the record is not persuasive that vegetation clearing took place, that new gravel was placed, or that fill was placed, in the driveway area after the work conducted under the grading permit for the restoration work and the field inspection sign-off in January 2002.

E. The work conducted on the site which resulted in the subject gravel improvements remaining in place, and over time becoming visibly more apparent from aerial photographs (and possibly from offsite vantage points as well), was work last conducted in or around 2000/2001 as an effort toward compliance with the prior enforcement action and subsequent grading permit. It was not new work performed after and separate from the authorized work performed under the grading permit and related County field inspection oversight.

F. The work addressed by the subject Notice and Order was not conducted without required permits, inspections and approvals as alleged in the Notice and Order.

G. As DDES has not proven its allegation that "a gravel road was created on the subject property…sometime after 2002…" without permits, etc., DDES has not made a *prima facie* case to support its charge of violation in the Notice and Order. The charge is simply not supported by the evidence in the record.

H. The County asserts that the driveway area was to be reseeded, but the fact that it was not and/or that any reseeding was not successful is irrelevant to the charge of violation in the subject Notice and Order on appeal. If the County had intended that the driveway area be completely covered and/or grassed in, the County failed to implement that intent in its restoration plan review, permit approval and/or field inspection. In the final analysis, the evidence shows that the gravel drive remained in place largely uncovered and fully usable as a distinct gravel driveway, through the grading permit review, work and inspection (and, importantly, final inspection approval), in essentially similar condition as it is in the present day. DDES's code enforcement approach is misdirected if it desires to revisit any perceived and/or actual unmet requirements of its grading permit and/or related field inspection through this new enforcement action.

CONCLUSIONS:

1. As the evidence in the record does not support the Notice and Order's charge of violation, the code violation found by the Notice and Order has not been proven and cannot be sustained.

2. As the Notice and Order charge of violation is not sustained, the appeal shall be granted and the Notice and Order reversed and vacated. Obviously, the Notice and Order's compliance schedule requirements become moot.

DECISION:

The appeal is GRANTED and the Notice and Order issued under the referenced file number on October 24, 2006 is REVERSED and VACATED.

ORDERED February 4, 2008.

_____
Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding Code Enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE DECEMBER 19, 2007, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E05G0246.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin representing the Department, Justin Park representing the Appellant, and Chris Tiffany.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	Copy of the Notice & Order issued October 24, 2006
Exhibit No. 2	Copy of the Notice and Statement of Appeal received November 3, 2006
Exhibit No. 3	Copies of codes cited in the Notice & Order
Exhibit No. 4a	Aerial photograph of the subject property, taken 2005 (1"=67 feet)
Exhibit No. 4b	Aerial photograph of the subject property, taken 2002 (1"=141 feet)
Exhibit No. 4c	Photograph of the subject property, taken by Holly Sawin on February 16, 2007
Exhibit No. 4d	Aerial photograph of the subject property, taken 2005 (1"=100 feet)
Exhibit No. 4e	Aerial photograph of the subject property, taken 2002 (1"=100 feet)
Exhibit No. 5	Site map prepared by Cris Tiffany, formerly of King County Code Enforcement, depicting approximate area of fill (gravel and dirt) placed on parcel, dated August 19, 1999
Exhibit No. 6	Site Plan for Grading Permit L00CG192 depicting required restoration, approved October, 2000
Exhibit No. 7	Sensitive Area Notice on Title for the subject parcel, dated October 3, 2000
Exhibit No. 8	Violation letter from Holly Sawin, King County Code Enforcement, to Appellants, dated February 21, 2006
Exhibit No. 9	Prehearing Order issued by Hearing Examiner, dated August 23, 2007
Exhibit No. 10	DDES staff report to the Hearing Examiner for E05G0246
Exhibit No. 11A	Not submitted
Exhibit No. 11B	Not submitted
Exhibit No. 11C	Compliance Certificate for E9800740, dated January 8, 2001
Exhibit No. 11D	Email from Greg Sutton to James Toole regarding citizen complaint, dated August 8, 2005, marked Confidential
Exhibit No. 11E	Not submitted
Exhibit No. 11F	Photographs of subject property, taken by MarJean Krupp, dated February 2000, March 2007, and September 2007
Exhibit No. 11G	Photographs of subject property taken by Holly Sawin, dated August 2005 and 2006
Exhibit No. 11H	Aerial photographs downloaded from TerraServer, dated August 2000
Exhibit No. 12	Aerial photograph of subject property, dated 2002, with vegetative area referred to in Holly Sawin's testimony circled

PTD:vsm
E05G0246 RPT